IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER MOHASCO CORPORATION

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OPINIONS BELOW.

The Opinion of the District Court for the Northern District of New York of October 17, 1978, granting Mohasco Corporation's (hereinafter "Mohasco") Motion for Summary Judgment, is reported unofficially at 19 FEP Cases 677 and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A1 - A22). The Opinion of the Court of Appeals of July 18, 1979, reversing the trial court, is officially reported at 602 F.2d 1083 and unofficially reported at 20 FEP Cases 464 and 20 CCH EPD ¶30, 137, and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A23 - A44).

JURISDICTION.

The opinion by a divided panel of the Court of Appeals was entered on July 18, 1979 (Cert. Pet. App. A23 - A44). The Court granted the writ of certiorari on December 10, 1979. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED.

This case involves the interpretation and application of the provisions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as "Title VII"), specifically Title VII § 706 (c), 42 U.S.C. § 2000e-5(c) and Title VII § 706(e), 42 U.S.C. § 2000e-5(e) (hereinafter referred to as "§ 706(c)" and "§ 706(e)" respectively).

The relevant portion of § 706(c) reads as follows:

> "In the case of an alleged unlawful employment practice occurring in a State. . .which has a State. . .law prohibiting the unlawful employment practice alleged and establishing or authorizing a State. . .authority to grant or seek relief from such practice. . ., no charge may be *filed* under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State. . .law, unless such proceedings have been earlier terminated. . . ."
>
> (Emphasis added.)

The relevant portion of § 706(e) reads as follows:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . ., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State. . . agency with authority to grant or seek relief from such practice. . ., such charge *shall be filed* by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State. . .agency has terminated the proceedings under the State. . .law, whichever is earlier. . . ."
>
> (Emphasis added.)

These statutory provisions are set forth in full in Appendix B to the Petition for a Writ of Certiorari (Cert. Pet. App. A51 - A52).

QUESTIONS PRESENTED.

(1) Whether the Court of Appeals for the Second Circuit erred in holding that, in enacting Title VII, Congress intended the word "filed" to have different meanings in §§ 706(c) and (e), so that a charge is "filed" on receipt by the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") for purposes of calculating the § 706(e) limitations period, but "filed" only after the expiration of the period of deferral to the State agency for § 706(c) purposes;

or

(2) If the Second Circuit did not err in so holding, whether it erred in further holding that the charging party may take advantage of the extended 300-day limitations period (granted by § 706(e) to a charging party who has "initially instituted" state proceedings) in spite of the fact that (a) neither state nor federal proceedings were instituted within 180 days of the alleged discriminatory act, and (b) the initial "filing" with the EEOC preceded the institution of proceedings before the State agency.

STATEMENT OF THE CASE.

Respondent Ralph H. Silver (hereinafter "Silver") was employed by Mohasco on July 15, 1974. His employment relationship with Mohasco was terminated on August 29, 1975. Silver submitted a letter to the EEOC, which is shown to have been received by the EEOC on June 15, 1976, 291 days after Silver's termination. This letter alleged that Silver ". . .was both hired and fired because of [his] religion", and specifically detailed an alleged plan pursuant to which he claimed Mohasco had created the position to which he was hired as a ". . .['minority slot'] to give token compliance with job anti-discrimination legislation. . . ." (App. A3.)

Because the New York State Division of Human Rights (hereinafter "Human Rights Division") is (and was at that time) a "706 Agency" under the EEOC's regulations, 29 C.F.R. § 1601.12(k) (1973), the EEOC forwarded Silver's letter to the Human Rights Division by Notice of Deferral Transmittal dated June 15, 1976. In apparent recognition of the unambiguous language of § 706(c) that ". . .no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. . .", the EEOC's Notice of Deferral included a statement that:

> "This charge is being deferred to your agency pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended. The Commission *will automatically file* this charge at the end of the deferral period, unless we are notified before the expiration of that period that your agency has terminated its proceedings."
>
> (App. A7; emphasis added.)

The Human Rights Division, by letter to Silver dated June 18, 1976, advised Silver of its receipt of his letter to the EEOC, and stated that:

> "You are invited to visit this or any other regional office of the Division to file a complaint."

and that:

> "It is requested that you file a complaint with this Division within 30 days."
>
> (App. A12.)

On August 12, 1976, 55 days later and 349 days after the termination of his employment with Mohasco, Silver filed a verified complaint with the Human Rights Division alleging essentially the same claim of employment discrimination because of his religious faith as had been raised in his letter to the EEOC. (App. A13 - A14.)

Sixty-six days after the EEOC mailed its "Notice of Deferral Transmittal" to the Human Rights Division, the EEOC, by Notice of Charge of Employment Discrimination dated August 20, 1976, notified Mohasco that Silver had filed a charge against Mohasco alleging employment discrimination under Title VII. (App. A17 - A18.) *See* 29 C.F.R. § 1601.13 (1972) (respondent to be served by EEOC with copy of charge within 10 days of filing) and § 1601.12(b)(1)(iv) (1975) (60 day deferral period to commence upon EEOC mailing of charge to 706 Agency). By a form letter of the same date over the signature of Edwin C. Casler, the Regional Director, the EEOC notified Silver that the EEOC had sent such Notice to Mohasco. (App. A15.)

On February 9, 1977, the Human Rights Division issued its determination that there was no probable cause to believe Mohasco had engaged in the unlawful discriminatory practice complained of by Silver. (Cert. Pet. App. A45 - A46.) This determination was upheld by Order of the New York State Human Rights Appeal Board on December 22, 1977. (Cert. Pet. App. A47 - A48.)

On August 24, 1977, the EEOC, over Mohasco's jurisdictional objection that Silver had failed to file a timely charge with the EEOC, issued its "no reasonable cause" determination. (Cert. Pet. App. A49 - A50.)

On the same day, the EEOC mailed to Silver notification of his right to commence a civil action within ninety days of his receipt of such notice. (App. A19 - A20.) Ninety-one days later, on November 23, 1977, Silver commenced this action by filing a complaint in the United States District Court for the Northern District of New York, citing Title VII as the sole basis for this action.

By Memorandum-Decision and Order dated October 17, 1978, the Honorable James T. Foley, of the United States District Court for the Northern District of New York, granted Mohasco's motion for summary judgment on the grounds that Silver failed to make a timely filing of his charge with the EEOC, and that the court therefore lacked subject matter jurisdiction with respect to Silver's claims against Mohasco. (Cert. Pet. App. A1 - A22.)

On appeal, a divided Second Circuit, on July 18, 1979, reversed the decision of the district court and held Silver's charge was timely filed with the EEOC. In this respect, Chief Judge Kaufman, writing for the majority, stated:[1]

> "We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is 'filed' for purposes of § 706(e) when received, and 'filed' as required by § 706(c) when the state deferral period ends."
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> (Cert. Pet. App. A29.)

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1 Chief Judge Kaufman was joined in his opinion by Judge Oakes. Judge Meskill filed a separate opinion dissenting from this portion of the Second Circuit's decision.

SUMMARY OF ARGUMENT.

The plain language of § 706(c) provides that in a state that has created a 706 Agency, no charge may be "filed" with the EEOC until 60 days (or, if the 706 Agency has been in existence less than one year, 120 days) after state proceedings have been commenced, unless such state proceedings have been earlier terminated. At the same time, § 706(e) unambiguously provides that a charge must be "filed" with the EEOC within 180 days of the alleged unlawful discriminatory practice, unless the aggrieved person has *initially instituted* state proceedings, in which case the charge must be "filed" with the EEOC within 300 days of the alleged unlawful discriminatory practice.

The legislative history indicates Congress specifically intended to require diligence on the part of a complainant, and further intended that a complainant initially seek redress from the state agency, if there was one. To accomplish these two goals, Congress: (1) established a deferral period during which no charge may be "filed" with the EEOC to provide the state agency with a meaningful opportunity to investigate and resolve the problem without federal interference; and (2) established a short 180-day limitations period for filing with the EEOC that is extended to 300 days only if the complainant has "initially instituted" state proceedings, to prevent a complainant from losing his federal right because he chose first to pursue his state remedies.

Thus, in keeping with these statutory provisions, the legislative history, and the prior decisions of this Court, when an aggrieved person in a deferral state submits a charge to the EEOC, the EEOC may not "file" that charge until the deferral period has run.

This Court has held that the EEOC may hold such a charge in "suspended animation" to be automatically "filed" upon the expiration of the deferral period. Whether the EEOC charge is timely for purposes of § 706(e) is controlled by the date the charge is "filed", not by the date the EEOC receives it. In this case, because the Human Rights Division proceedings did not terminate earlier, the earliest date the deferral period could have ended is August 14, 1976, 60 days after the EEOC mailed

Silver's charge-letter to the Human Rights Division, and 351 days after Silver's termination. Since the longest limitations period provided by § 706(e) is 300 days, Silver's charge-letter was untimely when the EEOC "filed" it on the day after the deferral period expired, 352 days after Silver's termination. In effect, Silver's charge died while in "suspended animation."

The Second Circuit below, however, held that notwithstanding the plain language of the statute, the EEOC may nonetheless "file" a charge on receipt for purposes of measuring the limitations provisions contained in § 706(e). Even assuming, *arguendo,* that this conclusion is correct, the Second Circuit erred because it did not give effect to the provision in § 706(e) extending the basic 180-day limitations period to 300 days only when ". . .the person aggrieved has initially instituted proceedings with a State. . .agency. . . ." The words "initially instituted", as used in § 706(e), are susceptible of only two interpretations. First, the language could require that, to be entitled to the 300-day period within which to file a charge with the EEOC, the person aggrieved must "initially institute" state proceedings within the shorter 180-day period; the effect of this construction is to require an aggrieved person to file *somewhere* within 180 days in order to file a timely charge with the EEOC. Alternatively, the words "initially instituted" could refer to the sequence in which the charges are filed. Under this interpretation, if, as the Second Circuit held, a charge is "filed" by the EEOC on receipt, the aggrieved person will have only 180 days to file a charge with the EEOC unless he or she *first* files a charge with the state agency. Under either of these interpretations, Silver's charge was untimely.

ARGUMENT.

The crucial issue presented by this case is whether Silver's charge-letter was timely filed with the EEOC. The resolution of this issue requires this Court to determine: (1) whether Silver's charge-letter was "filed" when the EEOC received it on June 15, 1976, 291 days after Silver's termination, or whether that charge was merely "submitted" to the EEOC, held in "suspended animation" for 60 days, and then "filed" on August 15, 1976, 352 days after Silver's termination; and (2) whether, on whatever date the charge was "filed", it was timely.

I. Pursuant To The Statutory Scheme Enacted By Congress, The EEOC May "File" A Charge Only After The Expiration Of The Deferral Period.

In this case, there is no dispute over when the statutory limitations period began--the parties agree the limitations period began to run on August 29, 1975, the date of Silver's termination. Rather, the dispute in this case involves the date the limitations period ended.

A. The Deferral Procedure Previously Approved By This Court, And Actually Followed By The EEOC In This Case, Considers A Charge To Be "Filed" By The EEOC After The Deferral Period Has Expired, Not On Receipt.

Section 706(c) provides in pertinent part that:

> ". . .no charge may be *filed* under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State. . .law. . . ."
>
> (Emphasis added.)

Section 706(e) provides in pertinent part that:

> ". . .in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State. . . agency. . .such charge *shall be filed* by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . ."
>
> (Emphasis added.)

Thus, the unambiguous language of § 706(c) clearly precluded the EEOC from "filing" Silver's charge-letter on June 15, 1976, the date the EEOC received that letter, because the statutory period of deferral to the state agency had not yet passed.

In apparent recognition of this statutory provision, the EEOC mailed the Human Rights Division a Notice of Deferral Transmittal dated June 15, 1976 in which it advised the Human Rights Division that:

> "The Commission will automatically file this charge at the expiration of the deferral period, unless we are notified before the expiration of that period that your agency has terminated its proceedings."
>
> (App. 7.)

This referral procedure was expressly approved by this Court in *Love v. Pullman Company*, 404 U.S. 522 (1972). In *Love,* the plaintiff submitted a "letter of inquiry" complaining of alleged discrimination to the EEOC prior to instituting state proceedings. The EEOC treated this letter as a complaint, but *did not formally file it.* Instead, the EEOC orally notified the 706 Agency that it had received a complaint from the plaintiff. By letter to the EEOC, the 706 Agency waived the opportunity to process the plaintiff's charge. The EEOC then investigated the complaint and issued a finding of reasonable cause, but was unable to obtain the defendant's voluntary compliance. This Court gave express approval to the procedure the EEOC followed in this case, saying:

> "We hold that the filing procedure followed here fully complied with the intent of the Act, and we thus reverse the judgment of the Court of Appeals. Nothing in the Act suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself, nor is there any requirement that the complaint to the state agency be made in writing rather than by oral referral. Further, we cannot agree with the respondent's claim that the EEOC may not properly hold a complaint in 'suspended animation,' automatically *filing it upon termination of the state proceedings.*"
>
> *(Love, supra,* 404 U.S. 525-26; emphasis added and footnotes omitted.)

It is important to note that in *Love* this Court did not hold the EEOC could treat the plaintiff's charge as "filed" on receipt for § 706(c) purposes, but instead implicitly rejected such treatment. The defendant in *Love* argued that the EEOC's holding the plaintiff's charge in abeyance pending state agency proceedings was a nullity because the EEOC was required to view charges as being filed with the EEOC when they were received. In rejecting that contention, this Court held:

> ". . .the statutory prohibition of 706(b) [now §706(c)] against filing charges that have not been referred to a state or local authority necessarily creates an exception to the regulation requiring filing on receipt."
>
> *(Love, supra,* 404 U.S. at 526, note 5.)

Thus, pursuant to the referral procedure approved by this Court in *Love,* the EEOC was required to consider Silver's charge as "filed" only after the expiration of the deferral period mandated by § 706(c). That the EEOC actually treated the charge in this manner is demonstrated by the fact the EEOC first notified Mohasco that Silver had filed a charge by Notice of Charge of Employment Discrimination dated August 20, 1976--66 days after the EEOC received Silver's charge-letter. (App. A17 - A18.) *See* 29 C.F.R. § 1601.13 (1972) (respondent to be served by EEOC with copy of charge within 10 days of filing).

The decision of the Second Circuit below, however, interpreted Title VII as establishing two "filing" dates: the EEOC charge is "filed" on receipt for purposes of calculating § 706(e)'s limitations period, and "filed" again upon the expiration of § 706(c)'s deferral period. In reaching this conclusion, the Second Circuit concededly eschewed both the literal meaning of § 706(c) (in favor of what it viewed to be the "fundamental policies embodied in Title VII" (Cert. Pet. App. A28 - A29)) and the above-quoted portions of the *Love* decision (in favor of what it viewed to be the "clear import" of that decision (Cert. Pet. App. A31, n. 13)).

It is submitted that it is incongruous to interpret the word "filed" to mean two different things within two subsections of the same statutory provision, and that the Second Circuit reached this result in an attempt to aid complainants at the expense of the clear statutory language and the rights of defendants in Title VII actions.

B. Although A Division Of Opinion Exists Between The Circuit Courts Of Appeal On The Issue Of When A Charge Is "Filed" With The EEOC, The Better Opinions Hold § § 706(c) and (e) Establish But One "Filing" Date.

Five circuits have considered the precise timeliness question presented by this case. One circuit has rendered a decision diametrically opposed to the view expressed by the court below. *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972) (Stevens, J.). The other three circuits have issued decisions that support the result rendered in the decision below. *See Vigil v. American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972); and *Richard v. McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972). However, the Eighth Circuit, sitting *en banc*, has since rendered an opinion sharply retreating from its position in *Richard, supra. Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975).[2] These decisions cannot be reconciled, but the opinions that best accord with the statutory language and the prior decisions of this Court are those that hold the word "filed" means precisely the same thing in § 706(c) as in § 706(e).

The Tenth Circuit, in *Vigil, supra*, 455 F.2d at 1224-25 held that: (1) the submission of a complaint to the EEOC during the deferral period provided by § 706(b)

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2 Similarly, in an extremely recent opinion, *Geromette v. General Motors*, 21 FEP Cases 649 (6th Cir. 1979), the Sixth Circuit specifically adopted the holding in *Olson, supra.* Curiously, although the court noted that tolling even on equitable grounds has been "very much restricted", the *Geromette* opinion does not refer to the Sixth Circuit's earlier decision in *Anderson.*

[now § 706(c)] fulfilled the requirement of § 706(d) [now § 706(e)] that a charge be "filed" within 210 [now 300] days of the date of the unfair employment practice complained of, even though the EEOC could not proceed with its investigation until after the 706 Agency had had the complaint for 60 days; and (2) in any event, the submission "tolled" the running of the 210 day limitations period.

The Sixth and Eighth Circuits, when confronted with similar situations, followed *Vigil*, but *only* with respect to *Vigil*'s holding that the submission of a charge to the EEOC before deferral to the 706 Agency "tolled" the running of the 210 day filing period then prescribed by § 706(d) [now § 706(e)]. *Anderson, supra,* 464 F.2d at 725 ("Submission of the original charge tolled the 210 day time limit."); *Richard, supra,* 469 F.2d at 1251 (". . . initial receipt of the original charges by the EEOC serves to toll the statute of limitations.").

However, an *en banc* Eighth Circuit, in *Olson, supra,* 511 F.2d at 1231-33, has since significantly limited its decision in *Richard,* stating:

> ". . .[I]t would not be in keeping with the intent of Congress to allow one individual 300 days to file a charge because of the fortuitous circumstance that the state where the claim arose is a deferral state, when another individual in a non-deferral state will have only 180 days in which to file. The purpose underlying the extended period in a deferral state is to give the state agency an initial opportunity to process the claim without jeopardizing the federal right, not to extend by 120 days the time for assertion of this federal right.
>
> . . .
>
> "Thus a charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act."

The Seventh Circuit, in an opinion written by then-Judge Stevens, and closely tracked by the district court in the instant case (although specifically rejected by the majority in the Second Circuit decision below), has held that a charge originally submitted to the EEOC and referred to a 706 Agency need not be resubmitted, but may be held by the EEOC in "suspended animation" for the duration of the deferral period to be automatically "filed" with the EEOC after the expiration of that period. *Moore, supra,* 459 F.2d at 826. The *Moore* court specifically rejected the *Vigil* rationale. First, the Seventh Circuit rejected *Vigil*'s holding that the EEOC could treat the charge as "filed" when received for § 706(e) purposes, but could defer processing the charge until the 706 Agency had the opportunity to act required by § 706(c). *Moore* reasoned this holding in *Vigil* was inconsistent with the language and structure of Title VII as a whole, the legislative history and the Supreme Court's decision in *Love, supra.* Next, *Moore* rejected *Vigil*'s rationale that the submission of a charge to the EEOC "tolled" the extended limitations period, holding:

> "In our view the statute provides a basic limitations period of 90 [now 180] days, which may be extended (or 'tolled') to a maximum of 210 [now 300] days. We do not think that Congress intended a further extension (or a second 'tolling') to achieve the same purpose (time for state consideration) as the original enlargement of the 90-day period to 210 days in those states which have a Fair Employment Practices Agency. If Congress had so intended, we believe it would have included such a provision instead of the 210-day limitation. Moreover, the difficult questions of statutory construction will seldom arise if the complainant's original filing is within the basic 90-day period. Although we may share the EEOC's view that less diligence should have been required, we must respect the legislature's choice of the appropriate period of limitations, whether that choice was made to effectuate the policies of the Act or as an element of a compromise that enabled it to pass."
>
> *(Moore, supra,* 459 F.2d at 429-30.)

These views contrast with the holding of the majority of the court below that there are two "filing" dates:

> "Confronted with [the provisions of §§ 706(c) and (e)], the able district court judge read § 706(c) literally. He reasoned that even when a charge is received by the EEOC well within 300 days of the alleged discrimination, it cannot be considered 'filed' with that office until sixty days after referral to the state agency. Thus, according to Judge Foley, Silver's charge, albeit received by the EEOC 291 days after his discharge, was not 'filed' before August 14, 1976, 352 days subsequent to the termination of his employment. Accordingly, Judge Foley determined that Silver was barred by the 300-day jurisdictional prerequisite of § 706(e).
>
> "The district court decision would, therefore, require a Title VII complainant to file his charge with the state agency within 240 days of discharge or forfeit the opportunity to bring his complaint before the EEOC. We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is 'filed' for purposes of § 706(e) when received, and 'filed' as required by § 706(c) when the state deferral period ends."
>
> (Cert. Pet. App. A28 - A29; footnote omitted.)

To summarize then, there are at least two, and possibly three, separate views of the requirements of §§ 706(c) and (e) that have received specific judicial sanction from Courts of Appeals.

First, the Second Circuit (in the case below), the Tenth *(Vigil, supra),* and, at one time, the Sixth *(Anderson, supra)* and Eighth *(Richard, supra)* Circuits have held that, in a deferral state, if a charge is received by the EEOC within 300 days of the alleged unlawful employment practice, that charge is timely if 706 Agency proceedings are thereafter timely instituted, whether or not such state proceedings are instituted within § 706(e)'s 300-day limitations period.

Second, there is the view adopted by the Seventh Circuit in *Moore,* the district court below, and Judge Meskill in dissent from the Second Circuit opinion below, that the requirements of § § 706(c) and (e) must be read literally, and that there is but one "filing" date. Section 706(c) provides that, in a deferral state, a charge *may not be* "filed" with the EEOC until after the expiration of the mandatory deferral period, while at the same time § 706(e) requires that the charge in such a case *must be* "filed" within 300 days of the alleged unlawful employment practice. Thus, a charge submitted to the EEOC is not automatically "filed" on receipt, but is held in "suspended animation" until the deferral period expires, and then is "filed". The timeliness of such a charge is governed by this "filing" date.

Finally, there is the view now espoused by the Eighth Circuit in *Olson,* (and recently adopted by the Sixth Circuit in *Geromette, supra)* that, to be timely, a charge must be "filed" with the EEOC, or, in a deferral state, with a 706 Agency, within 180 days of the alleged unlawful employment practice. It should be noted that *Olson* is not at all inconsistent with the holdings of *Moore,* so that *Olson* and *Moore* may in fact express but one view, rather than two.

1. This Court Has Implicitly Rejected The Foundation Of The Cases That Held The Mere Submission Of A Charge To The EEOC Before Deferral "Tolls" The Running Of § 706(e)'s Limitations Period.

As noted in greater detail above, *Anderson* and *Richard* held only that the submission of a charge to the EEOC before deferral to the 706 Agency "tolls" the running of the extended filing period provided by § 706(e), and *Vigil* utilized this "tolling" argument as an alternative ground for its decision. *Moore,* however, rejected this "tolling" argument as clearly contrary to the statute.

In its decision below, the Second Circuit specifically avoided adopting the "tolling" argument, stating:

> "We do not reach the question, decided affirmatively by [the Sixth, Eighth and Tenth] circuits, whether initial receipt of the charge by the EEOC 'tolls' the § 706(e) statute of limitations. Rather, we interpret § 706(c) in a manner consistent with the result reached in *Vigil, Anderson,* and *Richard.* Moreover, we note that the Tenth Circuit employed our statutory construction as an alternative ground in *Vigil, supra,* 455 F.2d at 1224."
>
> (Cert. Pet. App. A32, n. 15.)

It is proposed the Second Circuit wished to avoid the "tolling" argument because of this Court's decision in *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976) (Rehnquist, J.).

In *Electrical Workers,* a Title VII plaintiff contended that the limitations period of § 706(d) [now § 706(e)] had been tolled by his initiation of a grievance proceeding pursuant to a collective bargaining agreement. In rejecting that contention, this Court stated that:

> ". . .Congress has already spoken with respect to what it considers acceptable delay when it established a 90- [now 180-] day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. *In defining Title VII's jurisdictional prerequisites 'with precision,'* [citations omitted], *Congress did not leave to courts the decision as to which delays might or might not be 'slight'."*
>
> *(Electrical Workers, supra,* 429 U.S. at 240; emphasis added.)

In commenting upon the extended limitations period of § 706(d) [now § 706(e)] where a claim of discrimination is commenced before a 706 Agency, this Court stated that:

> "Where Congress has spoken with respect to a claim much more closely related to the Title VII claim than is the contractual claim pursued under the grievance procedure, and *then firmly limited the maximum possible extension of the*

limitations period applicable thereto, we think that all of petitioner's arguments taken together simply do not carry sufficient weight to overcome the negative implications from the language used by Congress [citation omitted]."

(Electrical Workers, supra, 429 U.S. at 240; emphasis added.)

Thus, this Court has severely limited the application of the "tolling" rationale, which was essential to the *Anderson* and *Richard* decisions and which was one of the alternative bases for the *Vigil* decision, and has strongly suggested that rationale is inapplicable to the facts presented in this case.

The Second Circuit apparently recognized this, for it quite properly avoided using "tolling" as a basis for holding Silver's charge-letter to have been timely filed. Curiously, the Second Circuit nonetheless viewed *Anderson* and *Richard* as supporting its conclusion that a charge is "filed" by the EEOC on receipt, although the Second Circuit acknowledged that the "tolling" argument was the sole basis for those decisions. (Cert. Pet. App. A32, n. 15.) Apparently, the support the Second Circuit drew from these opinions was a similarity in result, not in rationale. In light of *Electrical Workers'* implicit rejection of the foundation of the *Anderson* and *Richard* decisions, it is submitted that those cases are no longer viable precedents.

2. The Clear Language Of § 706(c) Permits The EEOC To Consider A Charge To Be "Filed" Only After The Expiration Of The Statutory Deferral Period, As Recognized By The EEOC When It Promulgated The Procedural Regulations That Were Effective When Silver Submitted His Charge-Letter.

Confronted with the facts of this case, the Second Circuit held a charge is "filed" for purposes of § 706(e) when received, and "filed" for purposes of § 706(c) when the deferral period ends.

The Second Circuit admitted this construction is not in keeping with the literal language of the statute. (Cert. Pet. App. A28 - A29.) In nevertheless reaching its conclusion, the Second Circuit draws on the services of the EEOC's current regulations, 29 C.F.R. Part 1601 (1978). (Cert. Pet. App. A34.) However, a different procedural regulation was effective when Silver submitted his charge-letter to the EEOC on June 15, 1976. That regulation, 29 C.F.R. § 1601.12(b)(1) (1975), 40 F.R. 3210N, provided:

> "(b) The following procedures shall be followed with respect to cases arising in the jurisdiction of '706 Agencies' to which the Commission defers as further defined in paragraph (c) of this section.
> "(1) Any document, whether or not verified, received by the Commission as provided in § 1601.7, which may constitute a charge cognizable under Title VII, shall be deferred to the appropriate 706 Agency, as further defined in paragraph (c) of this section, as provided in the procedures set forth below:
> "(i) All such documents shall be dated and time stamped upon receipt.
> "(ii) A copy of the original document shall be transmitted by registered mail, return requested, to the appropriate State or local agency, or, where the State or local agency has consented thereto, by certified mail, by regular mail or by hand delivery.
> "(iii) The aggrieved party and any person filing a charge on behalf of an aggrieved party shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(c), and that unless the Commission is notified to the contrary, *on the termination of State or local proceedings, or after 60 (or, where appropriate, 120) days have passed, whichever occurs first, the Commission will consider the charge to be filed with the Commission and commence processing the case.* Where the State or local agency terminates its proceedings within sixty (60) (or, where appropriate, 120)

days without notification to the Commission of such action the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination.

"(iv) The 60-day (or, where appropriate, 120-day) period shall be deemed to have commenced at the time such document is mailed or delivered to the State or local authority. Upon notification of the termination of State or local proceedings or the expiration of 60 (or 120) days, whichever occurs first, the Commission will consider the charge to be filed with the Commission and will commence processing the case.

. . ."

(Emphasis supplied.)

It is interesting to note that this regulation, promulgated three years after Congress passed the 1972 amendments to Title VII, clearly recognizes that § 706(c) precludes the EEOC from filing on receipt a charge originating in a deferral state. Rather, the regulation states the EEOC will consider the charge to be "filed" on the expiration of the deferral period.

In order to prevent charges like Silver's from being untimely, § 1601.12(b)(1)(v)(A) of these regulations further provided:

> "In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. . . ."
>
> (29 C.F.R. § 1601.12(b)(1)(v)(A) (1975), 40 F.R. 3210N; emphasis in the original.)

The district court below (Cert. Pet. App. A14 - A15, A18 - A19) struck down this section of the regulations, however, as an obvious and unauthorized attempt to circumvent the provisions of § § 706(c) and (e) by permitting the aggrieved person's charge to be "filed" on the 300th day after the date of the alleged unlawful discriminatory practice, irrespective of how long the charge had then been deferred. The Seventh Circuit, in *Moore, supra,* 459 F.2d at 824-25, struck down an analagous regulatory predecessor, 29 C.F.R. § 1601.12(b)(v) (1971), for the same reason. Silver (and the EEOC as *amicus* in the case below) implicitly conceded the correctness of these holdings by abandoning any argument based on these regulations that Silver's charge was timely.

More recently, the EEOC promulgated the regulations cited by the Second Circuit in support of its conclusion that the EEOC "files" charges arising in deferral states twice. These new regulations attempt to avoid the clear statutory provisions in a less flagrant manner. The current regulations purport to permit the EEOC to consider a charge to be "filed" for § 706(e) purposes on receipt, but prohibit the EEOC from processing that charge until the deferral period has expired. *See* 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977). To the extent these current regulations, promulgated long after the final disposition of Silver's charge by the EEOC, may be proposed *ex post facto* to support the timeliness of Silver's charge, Mohasco submits they are contrary to the plain meaning of the statute, as well as inapplicable to the facts of this case.

What is most interesting about the 1971 and 1975 regulations is how clearly they demonstrate the EEOC has always fully comprehended that § 706(c) prohibits a charge from being "filed" until after the deferral period had expired. In spite of this, the EEOC has attempted to avoid the clear requirements of this statutory provision -- flagrantly in the early regulations; more subtly in later regulations.

Despite the fact that the regulations promulgated by the EEOC in 1971 and 1975 expressly *prohibited* the EEOC from "filing" a charge on receipt, and the fact that

the current regulations *require* the EEOC to "file" a charge on receipt, the Second Circuit believed the EEOC's assertion that the "filing" procedure embodied in the current regulations is consistent with the earlier "filing" procedure, finding:

> "The EEOC has consistently maintained that a charge is 'filed' on the day it is received by the federal agency, without regard to the intervening deferral period. . . ."
>
> (Cert. Pet. App. A34.)

In view of the explicit statements in the regulations, this finding of consistent EEOC practice is clearly erroneous.

C. Application Of The Statutory Provisions To The Facts Of This Case Requires A Holding That Silver's Charge-Letter Was "Filed" After The Expiration Of § 706(c)'s Deferral Period, And Well Beyond Any Limitations Period Provided by § 706(e).

This Court should hold the Second Circuit erred in refusing to apply the statute literally to Silver's charge. The statute, as written, clearly requires a holding that Silver's charge was not timely filed. As established by *Love* and *Moore,* the EEOC may hold a submitted charge arising in a deferral state in "suspended animation", and "file" it after the expiration of the § 706(c) deferral period. *Moore*'s further holding, that the § 706(e) limitations period should be governed by the date of such "filing", certainly makes more sense than the contrary holding reached in *Vigil* and by a majority of the Second Circuit panel below, that a charge is "filed" for § 706(e) purposes when received, but "filed" for § 706(c) purposes only after the expiration of the deferral period.

Judge Meskill in dissent from the Second Circuit's opinion below, authored what is perhaps the clearest explanation of the complementary purposes and functions of § § 706(c) and (e):

> "Despite the much-emphasized complexity of Title VII, there is no dispute over the literal meaning of the two statutory provisions under examination. Section 706(c), the deferral provision, provides that in a state that has created an agency to hear employment discrimination claims (a 'deferral state'), no charge may be filed with the EEOC until 60 days or 120 days (depending on how long the state agency has been in existence) after state proceedings have been commenced, unless such state proceedings have been earlier terminated. Section 706(e), the limitations provision, provides that charges must be filed with the EEOC within 180 days of the alleged unlawful employment practice, except that where an aggrieved party has *initially instituted* state proceedings, a charge must be filed with the EEOC within 300 days of the alleged unlawful practice. [Emphasis added.]
>
> "The purposes behind these provisions are every bit as clear as their literal meanings. In *Love v. Pullman Co.,* 404 U.S. 522, 526 (1972), a unanimous Supreme Court explicitly stated that the purpose of Title VII's deferral provision is 'to give state agencies a prior opportunity to consider discrimination complaints' while the purpose of the limitations provision is 'to ensure expedition in the filing and handling of those complaints.' Not surprisingly, the scheme enacted by Congress effectuates these two different goals by imposing two different requirements on those who seek to invoke the remedial provisions of Title VII. Thus, a charge *must not* be filed with the EEOC until after the expiration of the mandatory deferral period (or termination of state proceedings), yet a charge *must* be filed with the EEOC within 300 days of an alleged unlawful employment practice. As a practical matter, a person who complains to the EEOC within 180 days of an alleged illegal employment practice can be sure of neither tripping on the deferral threshold nor bumping against the limitations ceiling. Regardless of whether the relevant state

> has created an agency to which deferral is necessary, and regardless of how long any such agency has been in existence, and regardless of how quickly any such deferral agency terminates its proceedings, the complaint will be timely."
>
> (Cert. Pet. App. A38 - A39.)

This logical analysis, which results in but a single filing date, is easily applied to the facts of this case. Silver "submitted" his charge-letter to the EEOC 291 days after the termination of his employment with Mohasco. The EEOC referred Silver's charge to the Human Rights Division the same day. Section 706(c) prohibited the EEOC from filing Silver's charge until 60 days after the Human Rights Law proceedings were commenced by Silver. Assuming the EEOC's referral "commenced" proceedings under state law for purposes of § 706(c), *cf. Oscar Mayer & Co. v. Evans,* ___ U.S. ___, 60 L.Ed.2d 609, 618-19 (1979), the earliest possible date the EEOC could have "filed" Silver's charge-letter was on August 15, 1976, the day after the 60 day deferral period expired, which was 352 days after the termination of Silver's employment with Mohasco. Because that date is well beyond the 300-day limitations period provided by § 706(e), Silver's charge was not timely filed.

II. Even If, Notwithstanding The Express Language Of The Statute, The EEOC Properly "Filed" Silver's Charge On Receipt, That Charge Was Not Timely Because Silver Did Not "Initially Institute" State Proceedings So As To Be Entitled To The 300-Day Limitations Period.

Even if this Court approves the Second Circuit's holding that the EEOC "filed" Silver's charge on receipt for purposes of the § 706(e) limitations period, Mohasco submits that charge was nonetheless untimely because Silver did not "initially institute" state proceedings and, therefore, was not entitled to the extended 300-day filing period.

The Second Circuit below approved an interpretation of § 706(e) that considers any charge arising in a deferral

state to be timely filed if it is received by the EEOC within 300 days after the date of the alleged discrimination, whether or not proceedings before the 706 Agency have already been commenced. This interpretation ignores the provision of § 706(e) that a charge must be filed with the EEOC within 180 days after the alleged unlawful employment practice *except* ". . .in the case of an unlawful employment practice with respect to which *the person aggrieved has initially instituted* proceedings with a State or local agency. . .", in which case the charge must be filed with the EEOC within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the 706 Agency has terminated the proceedings under the State or local law, whichever is earlier. This provision is susceptible of only two interpretations that give effect to the "initially instituted" language, and Silver's charge was untimely under either interpretation.

First, the phrase "initially instituted" could mean that the extended 300-day filing period is available only if the aggrieved person "initially instituted" state proceedings *within* the shorter 180-day filing period. This is the basis of the Eighth Circuit's *en banc* decision in *Olson,* where the court held:

> "While we agree that 'the statute leaves much to be desired in clarity and precision,' *Cunningham v. Litton Industries,* 413 F.2d 887, 889 (9th Cir. 1969), there is no doubt as to what the extended filing period in § 2000e-5(e) was intended to accomplish. In the 1964 Act a complainant was given 90 days in which to file a charge of employment discrimination. However, due to the proviso in then § 2000e-5(b) that the charge must first be made with a state or local agency if one exists, an additional 120 days was given to file a charge with the EEOC to allow a complainant to pursue his state or local remedies without prejudicing his federal right.
>
> "The extended filing period was not intended as a bonus for complainants residing in a deferral state but as a means of effecting an accommodation between the federal right and the requirement

of pre-amendment § 2000e-5(b) of initial resort to an available state or local agency.

"We are here concerned with amended Title VII. However, except for an enlargement of time for filing a charge from 90 to 180 days and concomitant extension of the deferral provision to 300 days, there were no substantive changes made in § 2000e-5(d) (renumbered § 2000e-5(e)).

"Thus a charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act."

(Olson, supra, 511 F.2d at 1232-33; footnotes omitted.)

Accord, Geromette, supra; Wiltshire v. Standard Oil Co. of California, 447 F. Supp. 756 (N.D. Cal. 1978); *Bittner v. Combustion Engineering,* 19 FEP Cases 1295 (N.D. Cal. 1979).

Second, the phrase "initially instituted" could refer to the sequence of filing. This is the conclusion reached by the Fourth Circuit in *Doski v. M. Goldseker,* 539 F.2d 1326 (4th Cir. 1976). *Doski* involved a plaintiff who first instituted timely state proceedings 281 days after the alleged discrimination. The plaintiff in that case submitted a charge to the EEOC on the same day. Three days later, 284 days after the alleged discrimination, the EEOC was notified that the 706 Agency had terminated its proceedings. In holding that in such circumstances the plaintiff could utilize the extended 300-day filing period provided by § 706(e), the court said:

> "Goldseker argues, and the district court agreed, that although the statute does not say so, the enlarged period of 300 days is not invoked unless the charges were filed with the state agency within 180 days of discrimination. Doski and the EEOC, as *amicus curiae,* contend that as long as

the charges are timely filed under the state agency's own regulations, the 300-day filing period with EEOC applies.

"The words of the statute provide no support for Goldseker's argument. On its face the section requires only that proceedings be 'initially instituted' with the State or local agency. While it clearly states that unless this procedure is followed charges must be filed within 180 days with the EEOC, it does not on its face require or in any way intimate that charges with the State or local agency must be initially instituted *within 180 days.* Goldseker argues that in using the word 'initially,' Congress meant to refer back to the first time limit period of 180 days. The best that can be said for such an argument is that if Congress meant that it failed to give it expression. Certainly we cannot read 'initially' to mean a limited time period.

"We disagree with Goldseker that *Love v. Pullman Co.,* 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972) and *Vigil v. American Telephone and Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972), indicate that the phrase 'initially instituted' does not refer to the order of filing the charge. All those cases hold is that a complainant's failure to file first with the state agency is not fatal to subsequent prosecution of a claim. But the meaning of the phrase is well settled: The state or local agency should be given first opportunity to act on the complaint. *Ugianski v. Flynn and Emrich Co.,* 337 F.Supp. 807, 808 n.1 (D.Md.1972). *See Ortega v. Construction and General Laborers' Union* No. 390, 396 F.Supp. 976, 981-82 (D.Conn. 1975); *Ashworth v. Eastern Airlines, Inc.,* 389 F.Supp. 597, 601 (E.D.Va.1975). *Cf. Love v. Pullman, supra* 404 U.S. at 526, 92 S.Ct. 616."

(Doski, supra, 539 F.2d 1329-30; footnotes omitted and emphasis in original.)

The case of *Williamson v. Chevron Research Co.,* 12 FEP Cases 95 (N.D. Cal. 1976), demonstrates the *Doski* interpretation is reasonable only if the EEOC considers

a charge to be "filed" after deferral:

> "The literal language of the statute states that the person aggrieved has 300 days in which to file with the EEOC if he 'initially' filed a charge with a state unfair employment practices agency such as the FEPC. It is true that, when plaintiff filed his charge, he went first to the office of the EEOC. However, using a procedure approved by the Supreme Court in Love v. Pullman, supra, the EEOC held his charge in abeyance while it filed a charge on his behalf with the FEPC. Only after the FEPC waived jurisdiction did the EEOC treat plaintiff's charge as formally before it. Plaintiff thus 'initially' filed his charge with the FEPC within the meaning of the statute. Ashworth v. Eastern Airlines, Inc., 389 F.Supp. 597, 601, 10 FEP Cases 672, 675 (E.D. Va. 1975).
>
> "This construction of the statute does no violence to the policy considerations which caused Congress to give persons 300 days to file with the EEOC if they initially filed a charge with a state agency such as the FEPC. The purpose of the extended filing period was 'to give the state agency an initial opportunity to process the claim without jeopardizing the federal right. . .' Olson v. Rembrandt Printing Co., 511 F.2d at 1232, 10 FEP Cases at 29. Where, as here, the claim is timely filed with the state, the state commission is afforded such an opportunity. Ugiansky v. Flynn & Emrich Co., 337 F.Supp. 807, 809 n.4, 4 FEP Cases 336, 337 (D.Md. 1972).
>
> "Moreover, if this court were to hold that plaintiff may not avail himself of the 300 day filing period because he first walked into the EEOC office rather than the FEPC office to file his charge, it would create an untenable and fortuitous distinction between two groups of plaintiffs in the same state. Those who first filed with the EEOC would have to file in 180 days, while those who filed first with the FEPC would have 300 days. Such a result flies in the face of the Supreme Court's mandate in Love v. Pullman, supra, that federal courts should avoid erecting technical barriers to those attempting to assert Title VII rights. Accord, Ugiansky v. Flynn & Emrich Co., supra."

(Williamson, supra, 12 FEP Cases at 96.)

Silver's charge clearly was untimely under the *Olson* interpretation, because Silver did not institute any proceedings within the initial 180-day filing period, even if Silver's charge-letter to the EEOC were to be considered "filed" on receipt.

Similarly, Silver's charge-letter was untimely under the *Doski* interpretation as well. If, as the Second Circuit below held, the EEOC "filed" Silver's charge-letter on receipt, then under the *Doski* interpretation Silver in fact "initially instituted" federal, rather than state, proceedings, and was not entitled to the extended 300-day filing period.

Although both *Olson* and *Doski* proffer plausible interpretations of the "initially instituted" language, it is submitted that the *Olson* reading of § 706(e) is more reasonable than *Doski*'s. *Olson* requires exactly the same degree of diligence on the part of all aggrieved persons -- every complainant must file somewhere within 180 days. On the other hand, the *Doski* reading extends a bonus to an aggrieved person who is lucky enough to live in a deferral state with a state limitations period that exceeds 180 days. Where there are two proffered interpretations, both of which purport to read the statutory language literally, the Court should prefer the interpretation that provides the most reasonable results.

III. The Legislative History Supports Mohasco's Interpretation That § 706(c) Prohibits The EEOC From "Filing" A Charge Until After The Expiration Of Any Required Deferral Period And That § 706(e) Requires An Initial Filing Within 180 Days Of The Alleged Unlawful Discriminatory Practice.

Silver and the EEOC have contended, and the majority of the Second Circuit below found, that the legislative

history supports the proposition that the EEOC can treat a charge arising in a deferral state as "filed" when received for purposes of the limitations period provided by § 706(e), but only as "received" for purposes of deferral to the state pursuant to § 706(c). Furthermore, the Second Circuit concluded that a charge so "filed" by the EEOC within the 300-day limitations period is timely so long as state proceedings are thereafter timely instituted, even though no filing whatsoever was made within 180 days of the alleged unlawful discriminatory practice.

Before embarking on a discussion of the legislative history of §§ 706(c) and (e), it is well to bear in mind a particularly relevant statement made by this Court when confronted with an attack on Title VII § 706(f)(1):

> "Only if the legislative history of § 706(f)(1) provided firm evidence that the subsection cannot mean what it so clearly seems to say would there be any justification for construing it in any other way. . . ."
>
> *(Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 361 (1977) (Stewart, J.).)

What little support may be found in the legislative history for the Second Circuit's construction of the statute is collected in the majority opinion of the court below:

> ". . .[B]efore the statute was amended in 1972 [footnote omitted], the Senate passed a bill designed to make explicit the construction we are adopting today. *See* S.2515, 92nd Cong., 2d Sess., 118 Cong. Rec. 289, 290 (1972).[3] The House-Senate Conference Committee, however, retained the pre-1972 language because '[n]o change in these provisions was deemed necessary in view of the recent Supreme Court decision of *Love v. Pullman Co.,'* 118 Cong. Rec. 7564 (1972). Moreover, the Conference Committee explicitly endorsed the decision of the Tenth Circuit in *Vigil* and stated that 'in order to protect the aggrieved person's right to file with the EEOC within the time periods specified. . ., a charge filed with a State or local agency may also be filed with the EEOC during the 60-day deferral period.' *Id.* It appears clear, therefore, that Congress accepted our interpretation of the statute as correct."
>
> (Cert. Pet. App. A33 - A34; footnote renumbered.)

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3 "S.2515 would have removed any reference to 'filing' in § 706(c) and would have stated instead that 'the Commission shall take no action' before the expiration of the sixty-day deferral period. The Senate asserted that

> [t]he present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language *clarifies* the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the [deferral] period has elapsed.
>
> "S.Rep.No. 92-415, 92nd Cong., 1st Sess. 36 (1971) (emphasis added)."

However, while these tidbits might be viewed as support for the Second Circuit's conclusion, they are not persuasive when viewed in the light of the *whole* legislative history. For instance, the district court below (Cert. Pet. App. A16) cited the following pronouncement of the managers at the conference on the bill to amend Title VII:

> "The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. The House bill made no

change in existing law. The Senate receded with an amendment that would re-state the existing law on the deferral of charges to state agencies. The conferees left existing law intact with the understanding that the decision in *Love v. Pullman,* [404 U.S. 522] (1972) interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling."

(Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 118 Cong. Rec. 6646-6647 (1972), *reprinted in* U.S. Cong. & Ad. News 2179, 2181.)

Representative Dent, one of the proponents of the 1972 amendments in the House of Representatives, explained the filing procedures as follows:

"Procedure Where No State Equal Employment Opportunity Law Exists

(1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.

. . .

"Procedure Where State Equal Employment Opportunity Law Exists

(1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.

"If a charge is initially filed with a state or local agency, such charge must be filed with the Commission within 300 days after the alleged unlawful practice has occurred or within 30 days after receipt of notice that the state or local agency has terminated its proceedings.

. . ."

(118 Cong. Rec. 7569 (March 8, 1972).)

As noted by then-Judge Stevens in *Moore, supra,* 459 F.2d at 824-25, Judge Meskill in dissent from the Second Circuit's decision below (Cert. Pet. App. A39 - A42), and Judge Schwarzer in *Wiltshire, supra,* 447 F. Supp. at 758, Title VII's filing provisions are the result of the so-called Dirksen-Mansfield compromise. Pursuant to that compromise, deferral states were to have exclusive jurisdiction for at least 60 days before the EEOC could act, but an aggrieved person who followed state procedure was nevertheless required to "file" a charge with the EEOC within the extended limitations period. Thus, before passage of the 1964 legislation, Senator Dirksen clearly explained the relationship between the proposed deferral section and the proposed limitations section:

" 'New subsection (b) provides that where there is such State or local law, no charge may be filed with the Commission by the person aggrieved until 60 days (120 days during the first year after the effective date of a new state or local law) after proceedings have been commenced under the State or local law. . . .

. . .

" 'New subsection (d) requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in subsection (b), he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. The addi-

tional 120 days is to allow him to pursue his remedy by State or local proceedings.

. . .' "

(Moore, supra, 459 F.2d at 825, n. 35, quoting EEOC's "Legislative History of Title VII and XI of Civil Rights Act of 1964", at p. 3018 [hereinafter referred to as "Leg. Hist."].)

Similarly, Senator Humphrey explained the compromise in this way:

" 'If the practice complained of occurs in a State or locality which has a law prohibiting such practices and establishing an agency to deal with them and there is no such agreement, the *individual complainant cannot file his charge with the Commission until the State or local agency has been given an opportunity to handle the problem under State or local law.* However, after the agency has had 60 days to adjust the complaint, or after it terminates proceedings on it, the complainant may go to the Federal Commission. The 60-day period will be 120 days during the first year that a State or local law is in effect.' [citation omitted] (emphasis added)."

(Moore, supra, 459 F.2d at 825, n. 34, quoting Leg. Hist. at 3003.)

These quoted provisions led then-Judge Stevens to conclude:

"The legislative history as a whole indicates a basic purpose to require the complainant to make his initial filing within 90 days; the extension of the period to 210 days in certain states was plainly intended to permit him to 'exhaust' the state procedures. *There is no suggestion that complainants in some states were to be allowed to proceed with less diligence than those in other states.* The above excerpts indicate that unless a complainant pursues his state remedies with sufficient diligence to permit the state, within 210 days,

either to complete its action or to have 60 days in which to act without federal interference, he may not file a timely charge with the EEOC."

(Moore, supra, 459 F.2d 825, n. 35; emphasis added.)

Accord Olson, supra, 511 F.2d at 1232-33; *Wiltshire, supra,* 447 F. Supp. at 759, n. 6.

Judge Meskill in dissent below elaborated further on this statement:

"When Title VII was amended in 1972, both limitations periods were lengthened. New section 706(e) specifies a base period of 180 days and a period of 300 days applicable to complainants subject to the statute's deferral requirements. The differential between the two remained the same: an aggrieved individual in a deferral state still has an extra 120 days in which to file with the EEOC so that compliance with the deferral requirements of the act can be achieved. Thus the limitations section as amended still ensures that no penalty is exacted from those in deferral states. No more diligence is required of those complainants than is required of their counterparts in states lacking deferral agencies.

"Like the cases on which it relies, the majority opinion overlooks the legislative history which clearly establishes that the statute is to be applied as it reads. *See Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); and *Vigil v. American Telephone and Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972). The majority offers nothing to support the assumption, necessarily implicit in today's decision, that Congress intended to give complainants in deferral states a 120 day bonus and to excuse them from exercising roughly the same degree of diligence required of persons in non-deferral states. It should be noted that in 1975, the Eighth Circuit, sitting en banc, concluded that

an examination of the legislative history excerpted above necessitated a rethinking of *Richard v. McDonnell Douglas Corp., supra,* which had attempted to interpret Title VII's filing requirements without reference to this history.

. . .

"The only legislative history on which the majority relies is an excerpt from a report of the House-Senate Conference Committee on the 1972 amendments, which endorsed the decision of the Tenth Circuit in *Vigil.* However, the fact remains that in 1972 Congress chose to leave the design and wording of the limitations subsection intact; the only changes made were a renumbering of the section and the lengthening of the two limitations periods contained therein. In my view, since the intent of the enacting Congress is unambiguous and the amending Congress chose to retain the original scheme, the evidence is insufficient to permit the inference that the later Congress intended to accomplish wholly new ends by leaving intact the scheme constructed by an earlier Congress which had different purposes in mind. *See Oscar Mayer & Co. v. Evans,* 47 U.S.L.W. 4569, 4571-72 (U.S. May 21, 1979)."

(Cert. Pet. App. A40 - A42.)

In *Doski,* the Fourth Circuit considered the legislative history of § 706(e), but the court first cautioned:

> "Goldseker places great weight on what it argues is legislative history supportive of its position. We believe what the Supreme Court stated in *United States v. Oregon,* 366 U.S. 643, 648, 81 S. Ct. 1278, 1281, 6 L.Ed.2d 575 (1961), is fully applicable here:
>
> > Having concluded that the provisions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act. Since the State has placed such heavy reliance upon that history, however, we do deem it appropriate to point out that this history is at best inconclusive.
>
> "(Footnotes omitted.) Similarly, we have stated that '[w]e do not think it permissible to construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated.' *United States v. Deluxe Cleaners and Laundry, Inc.,* 511 F.2d 926, 929 (4th Cir. 1975). . . ."
>
> *(Doski, supra,* 539 F.2d at 1332.)

Then after considering, among other things, the above-quoted portion of Representative Dent's explanation, the court concluded:

> ". . .When the above statement of liberal intent is read together with citation to *Vigil* in the [Section-by-Section] analysis of the preceding subsections, we are left with no clear explanation of legislative purpose. We conclude that the legislative history is not definitive enough to overcome the unambiguously clear wording of the structure."
>
> *(Doski, supra,* 539 F.2d at 1332-33; footnotes omitted.)

In *Doski,* the Fourth Circuit specifically rejected the Eighth Circuit's decision in *Olson* that § 706(e) requires an aggrieved person, to be entitled to the extended 300-day filing period, to file with the 706 Agency within 180 days. Thus, the *Doski* court found the legislative history inconclusive, and concluded it was therefore required to apply the statute literally. The problem is that while both *Olson* and *Doski* purported to read the statute literally, they reached different conclusions. Subsequently, the district court in *Wiltshire,* after careful consideration of the cases and the legislative history, concluded that *Olson*'s reading of the statute was correct and that *Doski*'s was not. *Wiltshire, supra,* 447 F. Supp. at 758-64. *Accord Bittner, supra,* 19 FEP Cases at 1297. It is important to note

both *Olson* and *Doski* are entirely consistent with *Moore* and *Love,* and that under either interpretation, Silver's charge was untimely filed.

It is submitted that the legislative history supports the conclusion reached by *Olson, Geromette, Wiltshire* and *Bittner* that an aggrieved person must file *somewhere* within 180 days.

IV. Mohasco's Interpretation Of § § 706(c) And (e) Is Reasonable And Would Not Lead To Anomaious Results.

It is submitted that Mohasco's interpretation of § § 706(c) and (e) does no more than track the statutory language and intent, and does not conflict with the EEOC's longstanding procedure for forwarding complaints arising in a deferral state to the 706 Agency for initial processing.

The statutory language mandates that the EEOC be prohibited from considering a charge to be "filed" until after the expiration of any required deferral period. This conclusion is buttressed by the clear legislative history showing a Congressional intent to require prior resort to available state remedies.

Furthermore, the legislative history demonstrates Congress intended that, in a deferral state, proceedings must be instituted with the state agency within 180 days of the alleged unlawful discriminatory practice.

This interpretation requires the same diligence of all complainants. No bonus period is given to a complainant merely because he is fortunate enough to reside in a deferral state. Further, no benefit is extended to a complainant who resides in a deferral state because that state has a long limitations period for filing charges with the state agency.

Mohasco's interpretation merely interprets this statute as Congress wrote it.

CONCLUSION.

For the foregoing reasons, we respectfully request the Court to reverse the decision of the Second Circuit Court of Appeals and remand this case to the district court with directions to dismiss all aspects of this lawsuit relating to any claims of discrimination by Mohasco alleged to have occurred more than 180 days or, alternatively, more than 300 days before Silver's complaint was "filed" with the EEOC.

Respectfully submitted,

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